

## Australians Exiled in India: Marooned or Banished?

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# CBI, or Exile!

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## Abstract

*This article explains aspects of citizenship by investment (CBI) nature through the lens of the concept of state-imposed exile and the weighting between an individual and the greater collective bound by the social contract. The paper concludes that CBI may act as some form of catalyst to overcome forms of exile. In doing so, the lens of exile may showcase issues and assumptions pertaining to CBI, as well as to citizenship itself. Citizenship and exile may act as antagonists within the problematic relationship of politics and law and the possible meanings of the 'social contract' in the relationship of the collective and the individual.*

## I. Introduction: The many faces of 'Exile'

In its legal dimension, citizenship is not a moral code or political value statement, but only that what it is actually stipulated for. In other words, while citizenship rules may demand language or cultural tests, naturalization or exemptions (CBI), the law cannot ensure solidarity, belonging, a moral code or (meaningful) political participation, which are all aspects virtually rendered redundant at law and spheres that are often, but wrongfully, conflated with citizenship's legal lens. Citizenship at law can act as a mechanism that pertains to the bordered paradigm, and enforce decisions of the community over the individual, including inroads into that individual's rights.

Poet and politician Dante Alighieri, in his own works, was taken on a journey to paradise, escaping from hell. This may relate to his actual physical exile. Dante was exiled from Florence where he served as one of six priors governing the city. It wasn't until Dante's banishment that he began work on his Divine Comedy: In the poem's first book, the poet takes a tour through Hell with the poet Virgil as a guide toward intellectual freedom.

Exile may then be viewed as a pathway to freedom, intellectually, spiritually, for which physical freedom may follow. Citizenship by Investment (CBI) may then pose as the catalyst system toward that pathway, and may take the form of self-exile, opting for alternative citizenship and residence options, as will be discussed below.

This article discusses and reconciles CBI and the notion of exile and banishment: For those who can afford it, CBI may provide a means to exit exiles and to provide lawful escapes from undue restrictions and unresolved status and legal limbo imposed.

*Article 9 of the [Universal Declaration of Human Rights](#) states that "No one shall be subjected to arbitrary arrest, detention or exile."*

It is doubtful that banning Indian-Australians from returning home is indeed something akin to 'exile' at all, as any act of actively exiling or punitive or political reasons may be missing. Likewise, the move may not at all be arbitrary. The ban could well be justified at least as to the letter of the law. Even banishment is unlikely where there is no active sending away of someone from a country. However, that does not make the move by a state to impose a return ban on its own member any less problematic.

In fact, when making decisions to exclude individuals from a life of participation in a polity, exiles, bans and bars may be supported by utilitarianist philosophy of the greater good, with focus on outcomes not acts, and on the collective's well-being rather than individual happiness.

Yet, overall, forms of 'exile' are problematic. Exile usually refers to banishment outside the borders of a given polity. While deportation is forced removal of non-citizens, extradition could be viewed as somewhat akin to the exiling of citizens, and it entailed the lifelong loss of citizenship and property. A milder form of was relegation, preserving citizenship and property.

Temporary or permanent exile, sometimes established ultimately through the death of the exiled, is a constant motif in literature and art, such as in ancient Greek tragedy and mythology, for example, in [Euripides' Medea](#) 431 BC. There, exile was seen as a fate worse than death, the exclusion from the social network, family, the polity, meaningful life, participation, and also from mobility and individual autonomy.

The isle of St Helena, with 4,500 miles from England and 1,200 miles from West Africa, is the epitome of exile, but still within the influence and scrutiny of the Realm, was once described as being the place "further away from anywhere else in all the world". As historian Frank McLynn asserts (1998, Napoleon, 651), for English poet Lord Byron, Napoleon Bonaparte was a Romantic hero, a persecuted, lonely, and flawed genius. When Napoleon heard that Prussian troops had orders to capture him dead or alive, he fled to Rochefort, where he eventually surrendered to Captain Frederick Maitland on the HMS Bellerophon on 15 July 1815. Other than he had hoped, however, there was no place for him on the mainland, from which he was kept as far away as possible, as he was, indeed from any other polity.

When a larger group, or occasionally a whole people is exiled over some substantive time, the term of diaspora comes to mind. The Jews, for instance, were deported by Babylonian King Nebuchadnezzar II in 586 BC and again, following destruction of the second Temple in Jerusalem, in 70 AD. During the period of National Socialism in the first few years following emergency powers and takeover in 1933, many Jews, as well as a significant number of German artists and intellectuals fled into exile. These included the author Klaus Mann, with whom Germany's own exile literature emerged.

Exile as the explicit refusal of permission to return home, may perhaps be viewed as a form of quasi- or temporary statelessness, the abandoning of a person from the civic polity and the prevention to (at least freely or meaningfully) exercise what is known as the Arendtian meta-‘right to have rights’ of citizenship (referring to Hannah Arendt work in the *Origins of Totalitarianism*) and the derivative rights that flow from that prime right. Exile then appears as something entirely different to the expatriation of citizens (vis-a-vis the deportation as a measure for non-citizens). It is most likely the establishing of a special status, at times, somewhat outside the metes and bounds of the law of the exiling polity, the effective casting out of the individual into either legal limbo or into some other jurisdiction. It can be punitive for the individual, and is usually justified on grounds of the protection of the polity. What exile means to individuals is to being forced away from one's home, whether this home is identified at local village level, town, city, state, province, territory, country or even region. Exile is, in civic terms, to make someone an outsider foreign to the polity whereas this person may still hold strong ties to the actual land or people. The exiled may still feel to belong. At its heart, it is the inability to return is what makes people become exiled, whether at law or in fact. Today, while digital platform are not polities, they do allow identity building: There may hence even be forms of digital exiling, such as the temporary exclusion or permanent banishment from social media, including the closing down of someone's facebook or twitter account. People, as well as corporations and even governments may become exiled yet still operate from exile.

The relation of exile and lifelong stigma or even death is an intimate one: In Roman law, *exsilium* meant both voluntary exile and banishment as a capital punishment alternative to death, including the lifelong loss of citizenship and the seizing of property by the authorities. It could effectively be used to wipe out one's personal record in a polity, forcing the person to live amongst Barbarians and consequently, be viewed as foreigners themselves.

Today, absent actual death, to deprive someone from return and participation for good may be likened to ‘dying the civil death’, a possible consequence of exile. Civil death (*civiliter mortuus*) is the loss of all or almost all civil rights by a person due to a conviction for a felony or due to an act by the government of a country that results in the loss of civil rights.

In many indigenous communities around the world, including in Australian Aboriginal criminal justice, exile is a punishment considered worse than death, it is dying the civil or social death. The Australian High Court has then decided that convicted non-citizen Australian indigenous could not be deported, with supra-national references created outside the citizenship paradigm, the indigenous link to ‘country’ as something more or different to civic ties to the polity, see an analysis [on the 2020 Love case](#).

Civil death may be inflicted on persons convicted of crimes against the state or even, at certain times and places, become determined by a court where adults are viewed as legally incompetent because of mental disability. In medieval Europe, felons lost all civil rights upon their conviction. This civil death often led to actual death, since anyone could kill and injure a felon with impunity. Under the Holy Roman Empire, a person declared civilly dead was referred to as ‘vogelfrei’ (German, for ‘free as a bird’, which is a counter-intuitive phrase used for being anything but free, but instead,

commodified, objectified, and such person could even become hunted and killed without consequence since they were completely outside the law. In terms of Giorgio Agamben's biopolitics in his works of *Homo Sacer* or *State of Exception*, this is to create a lawless individual state, *homo sacer*, being someone protected no longer at law, politics, or perhaps even morals, but with their bodies exposed to the power and force of others. Historically, the declaring of a person as an outlaw, was a common form of civil death.

Ends may or may not, ultimately, justify means. This depends on the circumstances, but it is a philosophy that can cause irrevocable individual suffering. For example, in the wake of global disaster such as climate change or emergency, and with health passports emerging (see [here](#) and [here](#)), indeterminacy now appears at rule, with new groups of social outcasts, marginalized or stigmatized and exiled potentially emerging.

## II. Australians in India - Marooned or banished?

The Bubonic Plague (or 'Black Death') killed 20 million in 14<sup>th</sup> century Europe, with Venice imposing on all incoming ships and persons a 40 days (the '[quarantinario period](#)') of waiting time in hospital quarantine on an offshore island.

At any rate, measures were taken locally, but complete border closures were not implemented. Throughout history, those that were sick have been exiled within a country (such as the US. Typhoid quarantine camps of 1892), but the sick were not banished from their country. Likewise, the cost and consequences of quarantining one's citizens are not usually imposed on third states. The idea of putting the possibly sick in quarantine goes back to the ancient texts. The book of Leviticus refers to the quarantine of lepers.

Today, there are currently at least 36000 Australian citizens stranded globally, the number including only those registered for government help to fly home. Prior to the pandemic, there were an estimated one million Australians living overseas. Australia was one of the first nations to close its borders in March 2020, barring arrivals except returning nationals, residents, and people granted exemptions (including celebrities or sport stars). Since October 2020, it has also allowed travellers from New Zealand. All arrivals are forced to undertake and to personally fund a two-week hotel quarantine. Also, citizens wishing to leave Australia need to be granted permission to do so, ie. the right to leave is now subject to, for example, showing that one leaves for at least more than 3 months. There are temporary travel caps, with about 7000 people allowed back into Australia per week. This number can be changed at any time, in January, it was halved due to the global virus mutations as well as local community outbreaks.

Some [9000](#) Australians are currently stranded in India. India is the world's second most populous nation, and it contends with a surge in COVID-19 cases and deaths. In a controversial and problematic move, let alone from a point of citizenship theory, there is now emerging the de-facto exiling of citizens not allowed home. Australian residents and citizens who have been in India within 14 days of the date they plan to return home will be banned from entering Australia as of Monday May 3<sup>rd</sup> 2021. [The temporary emergency determination, issued late on Friday, is the first time Australia has made it a criminal offence for its citizens to return home](#). Those who disobey may

face fines and jail - punishable by five years jail or an A\$66,000 (US\$51,000) fine. It remains to be seen if this logic become extended to other places and groups.

‘The government does not make these decisions lightly’, Australian Minister for Health Gregory Hunt [said](#). However, he emphasized that integrity of the Australian public health and quarantine systems are to be protected and the number of COVID-19 cases in quarantine facilities is reduced to a manageable level. Further, the government will reconsider the restrictions on May 15<sup>th</sup> 2021. Human Rights Watch's Australia director, Elaine Pearson [stated](#) that ‘[t]his is an outrageous response. Australians have a right of return to their own country.’

This example may show that citizenship is not an absolute individual right, but, if anything, subject to the collective social contract. Based on the notion of service to the collective general good, inroads into the individual rights approach of citizenship (including the purchase of citizenship in CBI mechanisms) may be justified. In a risk of harm assessment individual cases are weighed against the collective polity / all other citizens. The ban on citizens returning from India may be somewhat justifiable under the current spirit of emergency of the pandemic.

Measures such as this are in need of a clear sunset clause, which has arguably been provided to being subject to reconsideration from May 15<sup>th</sup>. These measures are limitations to rights subject to exceptions. It appears that the above measures are to protect the health system from overload and to protect the existing population. Polls show that Australians at home support to keeping the borders shut.

Generally, in the pandemic still posing as a state of emergency, Australia appears to here evoke the floodgate argument and utilitarian weighing of internal safety vs. its obligations to those citizens currently outside the polity. It is not clear but possible that the government could have instead extended the quarantine system by adding further facilities instead of reducing the number of plane arrivals allowed to come in each week or to impose blanket bans. Imposed exile, even made temporary, may have repercussions for the individual or the exiled group and their perception of the social contract. Citizenship is not only a legal status that can be switched on- and off subject to the bordered paradigm. Even this being the case at law being doubtful, to many, citizenship is not merely a legal or a commercial link, but they associate with it the social contract, an obligation to solidarity and burden-sharing, as well as an identity coming with a moral code.

It is not clear whether Australia could make and successfully rely on the (at any rate very likely flawed) argument that its citizens currently in India may be dual- or multiple citizens, so that their other home country, India, should look after them and shoulder the cost to do so. Such line of argument may diminish the status of citizenship itself, leading to fragmentation of citizenship into class citizenship with dual citizens in effect holding a lesser version of the same citizenship.

At the same time, for example, forms of bars on plural (dual- and multiple) may generally be perfectly legitimate means of government action. Art.44 of Australia’s Constitution assumes plural citizens to holding foreign allegiance, effectively [barring](#) these types of Australians to stand for parliament.



Yet again, where there would be dual citizens, responsibility by proximity may indeed require India to attend to its own citizens currently in India.

This again, and at any rate, may not take away anything of a country's responsibility to allow its citizens to return.

While Australia permits 'citizenship of two or more countries', providing this is legal according to all the relevant parties, India, however, does not in principle recognise plural (dual- or multiple) citizenship. By asserting Australian or other citizenship, India would expect renunciation of Indian citizenship. However, a certain type of 'dual citizenship' does exist: [Based on the recommendations of the High-Level committee on Indian diaspora](#), the Government of India decided to create and grant [Overseas Citizenship of India \(OCI\)](#): Initially, OCI is a form of residency and is not to be misconstrued to function as immediate dual citizenship. A person registered as OCI is eligible to apply for grant of Indian citizenship under section 5(1) (g) of the Citizenship Act 1955 if they are registered as OCI for five years and have been residing in India for one year out of five years before making the application.

At any rate, while on OCI status, card holders retain only some of the rights of Indian citizens, including the right to live and work in India permanently. Persons of Indian Origin (PIOs) who migrated from India and acquired citizenship of a foreign country other than Pakistan and Bangladesh, are eligible for grant of OCI as long as their home countries allow dual citizenship in some form or the other under their local laws.

Persons registered as OCI have not been given any voting rights, election to Lok Sabha/Rajya Sabha/Legislative Assembly/Council, holding Constitutional posts such as President, Vice President, and Judge of Supreme Court/High Court etc. Registered OCIs shall be entitled to following benefits:

- (i) Multiple entry, multi-purpose life-long visa to visit India;
- (ii) Exemption from reporting to Police authorities for any length of stay in India; and
- (iii) Parity with NRIs in financial, economic and educational fields except in the acquisition of agricultural or plantation properties. Further benefits to OCIs, if any, will be notified by the Ministry of Overseas Indian Affairs (MOIA) under section 7B (1) of the Citizenship Act, 1955.

Again, OCI status alone is no Indian citizenship, with civic responsibilities missing, such as the right to vote.

It is not clear as to whether the stranded are in fact OCI card holders. More information would be needed here. However, this question may not make much difference: Neither OCI nor in fact dual citizenship may likely affect Australia's responsibilities toward its citizens.

The take-away from this situation may be in case that CBI systems of passport plurality pose at least one resolution and alternative to this current situation: By holding another option beyond the Australian passport, Australians in India could make use of CBI strategic diversification, can in other words allow the escape from both risk to health in India as well as from politically imposed restrictions in Australia.

### III. Limitations to Limitations: Constitutions and Human Rights

Under current pandemic lockdown conditions and curtailed global mobility, any plural passport holders, including many CBI holders, could be viewed as being de-facto exiled, prevented at any rate from leaving or entering at least one of the countries of which they hold passports. As I have discussed [elsewhere in this forum](#), there is a universal right to leave and to return to one's country. However, this right, as well as other fundamental rights and freedoms in Constitutions and Human Rights law, is subject to a legal weighing process which may ultimately be difficult to be distinguishable from real life- or political-moral matters, showcasing the limitations of law vis-à-vis political power especially where individual and collective rights are to be weighed against one another. At the same time, any of the limitations must themselves be limited in principle, a concept that is known in the German Constitutional system as [Schranken-Schranken](#) (limitations to limitations), leaving a meaningful substance of rights based on the concept of human dignity. Human rights are norms arising from the state acting as custodians and fiduciaries toward citizens and even toward non-citizens. With sovereign power comes responsibility and duty of the sovereign toward the people: States are to guarantee security and equal enjoyment of rights and freedoms. This duty does not vanish in times of crisis, it is, if anything, a heightened one.

As seen above, exile cannot be arbitrary and there is a right to return to one's country, being the more specific right in the circumstances. The right to return may yet face some inroads and limitations imposed by municipal law. This is the case in the pandemic, with Australia's [Biosecurity Act \(2015\)](#) or Germany's *Infektionsschutzgesetz* (2000).

The latter Act entitles the German government to drastic limitations over civic-rights as blanket measure: The Act does not distinguish between no matter a person's status as vaccinated or not (its § 28c announces that status will be fleshed out in an upcoming Regulation, [but this is not yet the case](#)).

Under the Australian Act, the [human biosecurity emergency period](#) pertaining to COVID19 gets extended periodically. The emergency has been in place since 17 March 2020, and has again, in its latest inception, been extended by an additional three months until 17 June 2021, as declared by the Governor General.

The effects of these municipal laws on individual Constitutional rights as well as universal Human Rights (of which states themselves are the main guarantors and enforcers) are problematic and subject to debate. Absent any permanent state of exception and crisis, there may well be general consensus that individual rights cannot be abrogated for indefinite periods of time. This is because all emergency powers must ultimately reconcile with the Rule of Law and judicial scrutiny rather than governed by the rule of executive power, or face the separation of powers, judicial integrity and the Constitution to become redundant. The abrogation of rights and rephrasing of rights as privileges is problematic, but would arguably fall under actual or potential crisis justifications still covered by the Rule of Law in an attempt of systemic self-preservation. This, again, presupposes that the state of exception will not be a



permanent one, as this would otherwise entail the potential abrogation of an existing constitutional system and replacement with a new one, a phased system reset over time.

It is problematic that the narrative of pandemic crisis at law can be a circular and arbitrary one. This is because the question of [safety](#) itself depends on the circumstances of real-life matters such as pandemic science. If that were otherwise, and law would alone decide over the matter of crisis, with the letter of the law creating demarcations of pandemic response, absurd results may follow: Functioning in the context of placing an anticipated end to crisis, law may in effect make a circular case, with the end to crisis depending on crisis' definition at law.

Without limitations, the abovementioned municipal laws may see crisis time extended *ad infinitum*, subject to scientific resolve of the crisis in real life. Were the thresholds for crisis chosen too low at law, and with crisis containing elements of real-life, crisis at law may never 'end' as such, as crisis will likely never end in life but permanently exist. The state of exception and rights limitations would effectively be here to stay.

As stated in the introduction, there is a rule against arbitrary exile. However, even where such arbitrariness is missing in government decision making, crisis may itself be viewed as inherently arbitrary and indeterminate. This in turn, being at the heart of the issue, may consequently impact crisis response at law, rendering law itself indeterminate and subject to crisis. Emergency response at law may then as such be viewed as arbitrary, at least, with hindsight and from the perspective of longer periods of time, a luxury that arguably, does not exist whilst crisis endures.

#### IV. The harm principle

In classic Liberalism, the harm principle holds that the actions of individuals should only be limited to prevent harm to other individuals. John Stuart Mill articulated this principle in his work 'On Liberty' (1859), where he argued that '[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.' This is based on the earlier equivalent as stated in France's *Declaration of the Rights of Man and of the Citizen* of 1789.

The harm principle may be used by utilitarianists and libertarians alike, potentially justifying both pandemic restrictions, including exile, as well as providing for the necessary justification of avoiding the very same restrictions through multiple passports, enhanced visa free travel and strategic relocations. By the same token that individuals utilize CBI legal mechanisms to places of higher risk toward those of relative safety (rather than maintain solidarity through personal sacrifice), polities and governments seem to hold an almost absolute right to weigh risks against the collective in reference to the banishment of groups and individuals between the members of its own population. It is safe to say that plural nationality today, as a core fundamental of CBI systems, likely provides the basis for strategic relocation and exit from protracted crisis. CBI systems here pose as a perfectly legal way to avoid the difficult question of self- sacrifice for one's polity and an override to concepts of allegiance and to civic duties.

## V. Self-exile & CBI as legitimate means to escape banishment

Voluntary (self-) exile then is one specific expression of exile here that may show overlap to CBI. Self-exile may utilize CBI mechanisms, but it does not have to, and one may exile into non-CBI jurisdictions. Self-exile may be depicted by the person who claims it to be some form of protest or avoidance of persecution the person who claims it. Others may see this as means to an end, to avoid taxation or even prosecution (such as for tax-evasion or criminal allegations). This depends on the particular circumstances on a case-by-case basis: High net worth individual citizens of a jurisdiction moving to a jurisdiction with lower taxes are termed 'tax-exiles'. The English rock band the Rolling Stones who, in the spring of 1971, owed more in taxes than they could pay. They left Britain for France before the government could seize their assets. In 2012, Eduardo Saverin, one of the founders of Facebook, made headlines by [renouncing](#) his U.S. citizenship before his company's Initial public offering (IPO), the going public of a private company by sale of its stocks to general public. The dual Brazilian/U.S. citizen's decision to move to Singapore and renounce his citizenship resulted in a bill in the U.S. Senate, the *Ex-PATRIOT Act* (2012) [which, if it had passed, would have forced such wealthy tax exiles to pay a special tax in order to re-enter the United States](#). Asil Nadir fled to the Turkish Republic of Northern Cyprus for 17 years rather than face prosecution in connection with the failed £1.7 bn company Polly Peck in the United Kingdom.

One may ask: Are high-net worth individuals in fact choosing to self-exile? With some individuals holding more assets than states, the question becomes: Who is banning whom?

In any case, for those exiled, while the state may still allow for citizenship status, the rights under this status are severely or completely curtailed. This is because some of the civic rights of citizenship as the right to have rights may only become fully expressed and expressible when one is within one's polity of citizenship and amongst others, and not in isolation.

CBI may function as a way out of government-imposed creation of an individual fate of exile and that may otherwise appear as irreversible, justified and echoed throughout a polity and a moral political as well as normative consensus that can have the collective sacrifice some of its own members, if only to reinforce collective narratives of nationhood and belonging against those who do not, cannot, belong, for whatever internalized narrative and justification, if any.

The classic CBI case of the minority group of Bidoon in the middle East comes to mind, where any intention to actually relocate these stateless to the West-African Comoros was never an option. The assigning of nationality was to outcast and to deport the now foreigners to third countries instead. The passport bulk-purchase was a mere tool to initiate deportation of those who had now the citizenship status of another countries, were no longer stateless but foreigners about to become legally deported.

Likewise, there was a case where Tonga had assigned uninhabitable places for its passport purchasers while never having sufficient space in the first place.

## VI. Conclusion

The relevance to be personally mobile and to leave behind disaster or dystopia in any given polity cannot be overstated. This is not at all to abandon one's polity. At any rate, as this article has shown, those in exile can often serve their former homes, be that exiled writers or even entire governments. The lesson from the German Brothers Grimm's most astounding fairy-tale about exile as liberation, the [Bremer Stadtmusikanten](#), (the town musicians of Bremen) a fable about animals that were destined to becoming slaughtered by their masters the next morning. They banded together that night and left their farms and their pre-determined fate, creating for themselves new, joyful life somewhere else. Their motto was that 'we will always find something better than death.' The notion of alternative citizenship and global mobility is not about abandoning one's responsibility to one's polity. It is precisely an option against rogue states, arbitrariness and persecution. Choosing to leave one's country is a universal Human Right is ultimately grounded by the meta-right of Human Dignity as the catch concept.

Admittedly, there are also those who aim to escape their rightful punishment when trying to disassociate with their polity. However, black sheep in CBI do not mean that all the legitimate cases should become deprived from utilizing CBI global markets for membership entitlements and mobility systems. It is inherent in the human spirit to leave, to start over again, the notion of this venue alone grants hope, drives innovation and allows for the creation of new life beyond artificial borders or collectives imposing exile over individuals in an unjustified or unacceptable manner.